

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 4, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-1585-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

JOHN DEERE INDUSTRIAL EQUIPMENT COMPANY,

PLAINTIFF,

V.

ARICK J. TEALEY,

**DEFENDANT-
THIRD PARTY PLAINTIFF-APPELLANT,**

V.

**ISON EQUIPMENT, INC., RONALD ISON AND FABTEK,
INC.,**

**THIRD PARTY DEFENDANTS-
RESPONDENTS,**

**WISCONSIN PHYSICIANS SERVICE INSURANCE
CORPORATION,**

THIRD PARTY DEFENDANT.

APPEAL from a judgment of the circuit court for Dunn County:
DONNA J. MUZA, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

PER CURIAM. Arick Tealey appeals a judgment that dismissed his third-party lawsuit against Ison Equipment, Inc., and Fabtek, Inc.¹ Tealey's third-party lawsuit sought to enforce his right under § 402.608, STATS., of the Uniform Commercial Code to "revoke his acceptance" of a John Deere excavator he had bought from Ison, including a stroke processor manufactured by Fabtek that Ison had added to the machine. His third-party lawsuit also claimed that Ison and Fabtek breached their express warranties. Three years into the lawsuit, Tealey sought, without filing a formal written motion, to amend his third-party complaint to include a claim for breach of implied warranty. The trial court denied the request, evidently on the grounds that it was untimely and otherwise procedurally defective. The trial court also concluded that Tealey's acceptance revocation and express warranty causes of action failed to state claims on which relief could be granted. On appeal, Tealey argues that the trial court should have permitted the third-party complaint's amendment and that the dismissed claims stated valid causes of action. We reject Tealey's arguments and therefore affirm the judgment.

First, the trial court properly refused to amend the third-party complaint to allege an implied warranty claim. The trial court made a discretionary decision, and we see no misuse of discretion. *See Carl v. Spickler Enters., Ltd.*, 165 Wis.2d 611, 622-23, 478 N.W.2d 48, 52-53 (Ct. App. 1991). Tealey never filed a written motion to amend the pleadings. The lawsuit was three

¹ This is an expedited appeal under RULE 809.17, STATS.

years old, and Tealey did not supply good cause for adding an implied warranty claim at that late date. Such a procedure would not have been an efficient use of judicial resources. Second, the trial court properly dismissed Tealey's acceptance revocation and express warranty causes of action. Tealey waived those claims by continuing to use the equipment after notifying third-party defendants of such matters. *See Concrete Equip. Co. v. William A. Smith Contract Co., Inc.*, 358 F. Supp. 1137, 1140 (E.D. Wis. 1973); *Fox v. Wilkinson*, 133 Wis. 337, 342, 113 N.W 669, 671 (1907). Under these circumstances, Tealey's third-party complaint failed to state valid causes of action on those matters.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

